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17 **UNITED DISTRICT COURT**
 18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 19 **(SAN FRANCISCO DIVISION)**

20 CLAIRE C. HAGGARTY, individually and on
 21 behalf of all others similarly situated,

22 Plaintiff,

23 vs.

24 STRYKER ORTHOPAEDICS (aka STRYKER
 25 ORTHOPEDICS; aka STRYKER
 26 ORTHOPEDICS, INC.); HOWMEDICA
 27 OSTEONICS CORPORATION; STRYKER
 28 CORPORATION; and STRYKER SALES
 CORPORATION,

29 Defendants.

30 Case No: CV-08-01609-JCS

31 **NOTICE OF MOTION AND MOTION TO**
DISMISS PURSUANT TO F.R.C.P. RULE
12(b)(6), AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF

32 Date: July 11, 2008
 33 Time: 9:30 a.m.
 34 Room: A, 15th Floor
 35 Judge: Hon. Joseph C. Spero

36 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

37 PLEASE TAKE NOTICE THAT on July 11, 2008, at 9:30 a.m. in Courtroom A of the
 38 above-entitled court, or as soon thereafter as the matter may be heard, Defendants Stryker
 39 Orthopaedics; Howmedica Osteonics Corporation; Stryker Corporation; and Stryker Sales
 40 Corporation (collectively "Stryker"), by and through their counsel, hereby move to dismiss the
 41 Complaint in this action pursuant to Federal Rule of Civil Procedure Rule 12(b)(6).

1 This motion is made on the grounds that:

2 1) The Complaint fails to state a cause of action for violations of California Business
3 & Professions Code section 16700, *et seq.* (the “Cartwright Act”) because the
4 Complaint does not allege facts demonstrating that Stryker was part of a
5 conspiracy in violation of the Cartwright Act.

6 2) The Complaint fails to state a cause of action for violations of California Business
7 and Professions Code section 17200, *et seq.* (“Section 17200”), because (a) the
8 Complaint does not allege facts to show injury in fact or causation, (b) the
9 Complaint does not allege facts warranting an award of restitution, and (c) the
10 Complaint does not allege facts warranting the requested injunctive relief and, in
11 addition, the Court should abstain from adjudicating that injunction because, in
12 view of the extensive, ongoing regulation and monitoring already implemented by
13 federal authorities specifically to redress the very “kickback schemes” underlying
14 all of plaintiff’s claims, the requested injunctive relief would be pointless,
15 burdensome, and likely counterproductive.

16 This motion is based upon this Notice of Motion, the accompanying Memorandum of
17 Points and Authorities, the Declaration of William M. Goodman in Support of Motion to
18 Dismiss, the records on file in this action, and on such other and further evidence and argument
19 as the Court may permit in connection with this motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Stryker Orthopaedics, Howmedica Osteonics Corporation, Stryker Corporation and Stryker Sales Corporation (collectively, "Stryker") submit this brief in support of their motion pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Complaint for failure to state claims upon which relief may be granted.

PRELIMINARY STATEMENT

This class action is brought by Claire C. Haggarty, a resident of California who underwent hip replacement surgery in January 2006 and who alleges one or more Stryker products were implanted or otherwise used in her surgery. Plaintiff does not allege that she did not want the Stryker products, or that they were defective. Rather, plaintiff claims those products were overpriced because around the time of her surgery, Stryker allegedly violated California's antitrust laws by engaging in a conspiracy with unknown coconspirators, pursuant to an unidentified agreement. Plaintiff also asserts this "conspiracy" violated California's Unfair Competition Law, although plaintiff fails to describe how any of the alleged acts injured her.

The Complaint does not even remotely describe a conspiracy. Plaintiff alleges only that Stryker and its competitors in the hip and knee replacement market were each engaged in separate kickback agreements with surgeons. While baldly asserting this conduct was part of a conspiracy, plaintiff identifies neither the other purported co-conspirators nor any agreement among them and Stryker. At most, the Complaint alleges that Stryker and its competitors, motivated by independent self-interest, were engaged in parallel behavior.

Parallel behavior fails to state a claim under California’s antitrust statute. While the Complaint bandies about conclusory buzzwords like “conspiracy” and “collusive,” it fails to plead – as is required to state a claim under California’s antitrust laws – *facts* indicating that separate, independent entities combined their efforts and engaged in an unlawful conspiracy to restrain trade. Courts have routinely dismissed virtually identical claims, and plaintiff’s first cause of action should likewise be dismissed as a matter of law.

The Court should also dismiss plaintiff's second cause of action, brought under California's Unfair Competition Law ("Section 17200"), because the Complaint fails to allege

1 that Stryker caused plaintiff any injury in fact or that plaintiff is entitled to any relief under
 2 Section 17200, by way of either injunction or restitution. Plaintiff has failed to plead the
 3 requisite “causation” or “injury in fact” because she has alleged no facts reflecting she suffered
 4 any injury *at all*, much less as a result of Stryker’s alleged misconduct. Moreover, that and
 5 plaintiff’s failure to allege the out-of-pocket expenses she allegedly paid for her hip replacement
 6 surgery were paid for any Stryker product or benefited Stryker in any way preclude any award of
 7 restitution under Section 17200. And plaintiff’s failure to adequately allege any conspiracy or
 8 direct injury from the alleged misconduct also precludes the injunctive relief she seeks, which is
 9 directed solely to the insufficiently alleged “conspiracy” and concerted action. Further, in view
 10 of the extensive, ongoing regulation and monitoring of Stryker and others referenced in the
 11 Complaint *and already implemented by federal authorities specifically to redress the very*
 12 *alleged “kickback schemes” underlying plaintiff’s allegations*, the requested injunctive relief
 13 would be pointless, wasteful, and likely counterproductive, and this Court should abstain from
 14 granting it.

15 Finally, the class claims should be dismissed because plaintiff does not allege any facts
 16 reflecting that she is a member of the putative class she describes.

17 **BACKGROUND AND SUMMARY OF PLAINTIFF’S CLAIMS**

18 The individual defendants are related entities who fall under the corporate umbrella of the
 19 Stryker Corporation and are involved in the manufacturing of artificial hip and knee replacement
 20 products. Complaint ¶¶ 1, 8-11. Howmedica Osteonics Corporation and Stryker Sales
 21 Corporation are subsidiaries of the Stryker Corporation, and Stryker Orthopaedics is a division of
 22 the Howmedica Osteonics Corporation (collectively, “Stryker”). Complaint ¶¶ 8-11.

23 Plaintiff brings this action against Stryker on behalf of a putative class consisting of:

24 All individuals who are, or at the relevant time were, residents of
 25 California who either were uninsured or had a private health care
 26 insurance policy pursuant to which they paid a percentage of the total
 27 costs of surgical procedures, and who had hip or knee implant surgery
 28 during the Class period that involved the use of Stryker products.

Complaint ¶ 31.

1 Plaintiff alleges she is a resident of California who underwent hip replacement surgery in
 2 January 2006 and that “[o]ne or more Stryker products were implanted or otherwise used in her
 3 surgery.” Complaint ¶¶ 7, 30. She also alleges she paid approximately \$3,600 in “out-of-pocket
 4 expenses” for her surgery, but conspicuously does not allege that all or any part of that \$3,600
 5 (1) was paid, directly or indirectly, for the Stryker products allegedly implanted or used during
 6 the surgery or otherwise benefited Stryker in any way; or (2) reflected or resulted from
 7 wrongdoing by *anyone*, much less by Stryker.

8 Plaintiff also alleges that (1) Stryker was one of the “big five” manufacturers of hip and
 9 knee replacement devices, who together control almost 95% of the market for these products
 10 (Complaint ¶ 17); (2) Stryker and its four major competitors have each been engaged in
 11 “kickback schemes” with surgeons since 2002 (Complaint ¶¶ 1, 2, 21); and (3) these schemes
 12 allegedly involve consulting agreements through which each competitor paid certain unnamed
 13 surgeons for their loyalty and agreement to use that competitor’s products exclusively.
 14 Complaint ¶¶ 1, 2, 22. Significantly, plaintiff does *not* allege that *her* surgeon was engaged in
 15 any such kickback agreement with Stryker.

16 Plaintiff’s first cause of action alleges that Stryker and “un-named co-conspirators”
 17 entered into a conspiracy “to create and maintain market dominance, resulting in artificially high
 18 prices for Stryker hip and knee surgery products” in violation of California’s antitrust statute, the
 19 Cartwright Act, Cal. Bus. & Prof. Code §§ 16700, *et seq.* Complaint ¶¶ 44-49. Specifically,
 20 plaintiff alleges:

21 Stryker and its unnamed co-conspirators committed acts that
 22 constituted prohibited conduct under the Cartwright Act, including
 23 without limitation making illegal agreements to reduce competition
 24 and to inflate the price and costs of Stryker hip and knee surgery
 25 products, unlawfully overcharging public health insurance
 26 programs in violation of the California False Claims Act as well as
 27 other statutes. Stryker’s conduct has unfairly and unlawfully
 28 increased the price and cost of devices and other products used in
 hip and knee surgeries.

27 Complaint ¶ 46.

28

1 Plaintiff's second cause of action alleges that Stryker violated Section 17200 by engaging
 2 in "unlawful, unfair, and/or fraudulent business practices," including the alleged conspiracy
 3 described above. Complaint ¶¶ 50-56.

4 As we will show, because both causes of action fail to state a claim upon which relief
 5 may be granted, the Complaint should be dismissed.

6 **ARGUMENT**

7 The Complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of
 8 Civil Procedure. A court may dismiss a complaint as a matter of law for: (1) lack of a cognizable
 9 legal theory; or (2) insufficient facts under a cognizable legal claim. *Smilecare Dental Group v.*
 10 *Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir.), *cert. denied*, 519 U.S. 1028
 11 (1996). The district court is obliged to presume the plaintiff's factual allegations are true and
 12 must draw all reasonable inferences in the plaintiff's favor. *Adams v. Johnson*, 355 F.3d 1179,
 13 1183 (9th Cir. 2004).

14 The Court is not required, however, to accept conclusory allegations in the complaint as
 15 true in considering its sufficiency; rather the court should examine whether conclusory
 16 allegations are supported by the description of facts alleged by the plaintiff. *Holden v.*
 17 *Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802,
 18 810 (9th Cir. 1988). *See also, Adams*, 355 F.3d at 1183 (unwarranted inferences are insufficient
 19 to defeat a motion to dismiss).

20 **I. THE COURT SHOULD DISMISS COUNT ONE OF THE COMPLAINT
 21 BECAUSE PLAINTIFF FAILS TO PLEAD FACTS PLAUSIBLY SUGGESTING
 22 THAT STRYKER WAS PART OF A CONSPIRACY IN VIOLATION OF THE
 23 CARTWRIGHT ACT.**

24 **A. Applicable Legal Standard**

25 A plaintiff claiming violation of the Cartwright Act must allege: (a) the formation and
 26 operation of a conspiracy; (b) illegal acts done pursuant to the conspiracy; (c) a purpose to
 27 restrain trade; and (d) damages caused by these acts. *See Chicago Title Ins. Co. v. Great*
 28 *Western Financial Corp.*, 69 Cal. 2d 305, 318 (1968) ("General allegations of the existence and

1 purpose of the conspiracy are insufficient and appellants must allege specific overt acts in
 2 furtherance thereof.”).

3 Regarding the first prong, it is incumbent upon the plaintiff to allege, and ultimately
 4 prove, the existence of an unlawful trust or combination: there cannot be a violation of the
 5 Cartwright Act without an agreement or conspiracy. *Chicago Title Ins. Co.*, 69 Cal. 2d at 318.
 6 Further, “[o]nly separate entities pursuing separate economic interests can conspire within the
 7 proscription of the antitrust laws against price fixing combinations.” *Freeman v. San Diego*
 8 *Ass'n of Realtors*, 77 Cal. App. 4th 171, 189 (1999) (*citing Copperweld Corp. v. Independence*
 9 *Tube Corp.*, 467 U.S. 752, 769-71 (1984)). Thus, there can be no conspiracy to violate the
 10 antitrust laws between a parent and its subsidiary or a principal and its agent. *See id.*

11 The Supreme Courts of the United States and of California have both recognized that to
 12 plead an antitrust conspiracy claim requires “a complaint with enough factual matter (taken as
 13 true) to suggest that an agreement was made. An allegation of parallel conduct and a bare
 14 assertion of conspiracy will not suffice.” *Bell Atlantic Corp v. Twombly* (“*Twombly*”), 127 S.Ct.
 15 1955, 1958 (2007); *Freeman*, 77 Cal. App. 4th at 189 (“[a] general demurrer will be sustained
 16 where the complaint makes conclusory allegations of a combination and does not allege with
 17 factual particularity that separate entities maintaining separate and independent interests
 18 combined for the purpose of restraining trade.”).¹ “Even ‘conscious parallelism,’ a common
 19 reaction of ‘firms in a concentrated market [that] recogniz[e] their shared economic interests and
 20 their interdependence with respect to price and output decisions’ is ‘not in itself unlawful.’”
 21 *Twombly*, 127 S.Ct. at 1964 (*quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,
 22

23 ¹ As the Supreme Court of California noted in *Marin County Bd. of Realtors v. Palsson*, 16 Cal.
 24 3d 920, 925 (1976): “A long line of California cases has concluded that the Cartwright Act is
 25 patterned after the Sherman Act and both statutes have their roots in the common law.
 26 Consequently, federal cases interpreting the Sherman Act are applicable to problems arising
 27 under the Cartwright Act.” *See also Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 369
 28 (2001), *review denied*, (2002) (“Since the Cartwright Act and the federal Sherman Act share
 similar language and objectives, California courts often look to federal precedents under the
 Sherman Act for guidance.”)

1 509 U.S. 209, 227 (1993)). Accordingly, to state a claim, allegations of parallel conduct “must
 2 be placed in a context that raises a suggestion *of a preceding agreement.*” *Id.* at 1966 (emphasis
 3 added).

4 The United States Supreme Court dismissed the antitrust claims in *Twombly* because they
 5 (1) rested on descriptions of parallel conduct, and not upon independent allegations of an actual
 6 agreement among the defendants (*id.* at 1970 (“[a]lthough in form a few stray statements spoke
 7 directly of agreement, the statements were merely legal conclusions resting on the prior
 8 allegations.”)); and (2) lacked the specificity required by Rule 8 of the Federal Rules of Civil
 9 Procedure (*see, id.* at 1971, fn. 10) (“The pleadings mentioned no specific time, place, or person
 10 involved in the alleged conspiracies” and “furnish[] no clue as to which of the four [defendants]
 11 (much less which of their employees) supposedly agreed, or when and where the illicit
 12 agreement took place.”). After noting that such a lack of specificity would leave a defendant
 13 seeking to respond to plaintiff’s conclusory allegations with “little idea where to begin” (*id.*), the
 14 Court concluded that “nothing contained in the complaint invests either the action or inaction
 15 alleged with a *plausible* suggestion of conspiracy.” *Id.* at 1971 (emphasis added).

16 **B. Plaintiff Fails To Plead Facts Plausibly Suggesting That Stryker Was Part Of
 17 A Conspiracy In Violation Of The Cartwright Act.**

18 Even accepting the factual allegations of the Complaint as true, plaintiff’s Cartwright Act
 19 claim should be dismissed because it fails to allege facts plausibly suggesting that Stryker
 20 engaged in a conspiracy. While replete with conclusory allegations of “conspiracy” and
 21 “collusion,” the complaint conspicuously fails to allege the time, place, or even the purported
 22 “co-conspirators” involved in the alleged conspiracy, much less facts suggesting any agreement,
 23 collusion, or concerted action among the alleged co-conspirators and Stryker.

24 Indeed, the only concerted action alleged is “cooperation” *among the Stryker defendants
 25 themselves:*

26 13. At all relevant times, Defendants, and each of them, in
 27 performing the acts alleged in this complaint, were acting as the
 28 agents, employees, and/or representatives of each other, and were
 acting within the full course and scope of their agency and
 employment with the full knowledge, consent, permission,

1 authorization, and ratification, either express or implied, of each of
 2 the other Defendant.

3 14. Each of the Defendants has participated as members of
 4 the conspiracy, and has acted with or in furtherance of said
 5 conspiracy, or aided in carrying out the purpose of the conspiracy,
 6 and has performed acts and made statements in furtherance of the
 7 conspiracy and other violations of California law. Each of the
 8 Defendants acted both individually and in alignment *with other*
 9 *Defendants*, with full knowledge of their respectful wrongful
 10 conduct. As such, *the Defendants conspired together*, building on
 11 *each other's* wrongdoing, to accomplish the acts outlined in this
 12 complaint. Defendants are sued individually as principals,
 13 participants, and aiders and abettors in the wrongful conduct
 14 complained of; the liability of each arises from the fact that each
 15 has engaged in all or part of the improper acts, plans schemes,
 16 conspiracies, or transactions complained of herein.

17 Complaint ¶¶13-14 (emphasis added).

18 But “cooperation” among the Stryker defendants fails as a matter of law to allege a conspiracy.
 19 The complaint admits on its face that the Stryker defendants are all related entities – parents or
 20 subsidiaries of one another. Complaint ¶¶ 8-14. Accordingly, as a matter of law, they cannot conspire
 21 with each other because they are not separate, independent entities capable of combining their efforts to
 22 restrain trade in violation of the Cartwright Act. *See, e.g., Copperweld Corp.*, 467 U.S. at 769-71
 23 (dismissing conspiracy claim: a wholly owned subsidiary could not conspire with its parent under the
 24 Sherman Act because the two have “a complete unity of interest” and “share a common purpose whether
 25 or not the parent keeps a tight rein over the subsidiary....”); *Bell Atlantic Business Systems v. Hitachi Data*
 26 *Systems Corp.*, 849 F. Supp. 702, 707 (N.D. Cal. 1994) (holding it unnecessary to conduct a factual
 27 inquiry if the facts show parent has legal control of its subsidiary); *Freeman*, 77 Cal. App. 4th at 189
 28 (“entities must have separate and independent interests that are combined by the unlawful conspiracy.”);
Reynolds v. Bement, 36 Cal. 4th 1075, 1090 (2005) (holding that “[a]gents and employees of a
 corporation cannot conspire with their corporate principal or employer where they act in their official
 capacities on behalf of the corporation and not as individuals for their individual advantage.”) (internal
 quotation omitted); *see also, Palmer v. Gotta Have It Golf Collectibles, Inc.*, 106 F. Supp.2d 1289, 1299-
 1301 (S.D. Fla. 2000); *Coast Cities Truck Sales, Inc. v. Navistar Internat. Transportation Co.*, 912 F.

1 Supp. 747, 764-766 (D.N.J. 1995); *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1131-35
 2 (3d Cir. 1995); *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 447 (9th Cir. 1993).

3 Otherwise, the Complaint suggests, at most, “conscious parallelism” among competitors,
 4 which *Twombly* held insufficient to plead an antitrust conspiracy. *Id.* at 1964. Here, as in
 5 *Twombly*, the Complaint “mention[s] no specific time, place, or person involved in the alleged
 6 conspiracies” and “furnish[es] no clue as to... [who] supposedly agreed, or when and where the
 7 illicit agreement took place.” *Twombly*, 127 S.Ct. at 1971 n.10. Accordingly, here, as in
 8 *Twombly*, the antitrust conspiracy claim should be dismissed because “nothing contained in the
 9 complaint invests either the action or inaction alleged with a *plausible* suggestion of conspiracy.”
 10 *Id.* at 1971 (emphasis added); *In re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953,
 11 965 (N.D. Cal. 2007) (applying same analysis to a Cartwright Act claim); *Korea Kumho*
 12 *Petrochemical v. Flexsys America LP*, 2008 WL 686834, *9 (N.D. Cal. March 11, 2008) (same).

13 **II. THE COURT SHOULD DISMISS COUNT TWO OF THE COMPLAINT BECAUSE
 14 IT FAILS TO PLEAD FACTS REFLECTING THAT STRYKER’S ALLEGED
 15 MISCONDUCT CAUSED PLAINTIFF ANY INJURY IN FACT OR THAT SHE IS
 16 ENTITLED TO ANY RELIEF UNDER THE UNFAIR COMPETITION LAW**

17 To state a claim under the California Unfair Competition Law, Section 17200, a plaintiff
 18 must allege an injury in fact to plaintiff, in the form of lost money or property, as a result of
 19 some unfair (*i.e.*, harm to plaintiff outweighs benefit to defendant), unlawful, or fraudulent
 20 business practice committed by the defendant. *See generally* Cal. Bus. & Prof. Code § 17200 *et.*
 21 *seq.*; *see also* *Hall v. Time, Inc.*, 158 Cal. App. 4th 847, 849 (2008). In addition, as the
 22 California Supreme Court explained in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th
 23 1134 (2003), only two remedies are available to redress violations of Section 17200: injunctive
 24 relief and restitution. *Id.* at 1147.

25 Plaintiff’s claim under Section 17200 should be dismissed for three reasons: First, the
 26 Complaint fails to allege facts showing injury in fact or causation; second, the Complaint fails to
 27 allege facts warranting restitution from Stryker under Section 17200; and third, plaintiff has
 28 failed to alleged any factual basis for, or her standing to request, the injunctive relief she seeks,
 which, in any event, the Court should abstain from adjudicating because the very “kickback

1 schemes” underlying the alleged Section 17200 violation are already the subject of extensive
 2 regulation, redress, and monitoring by federal authorities.

3 **A. The Complaint Fails to Allege Facts Showing Either Injury in Fact or**
 4 **Causation**

5 To suffer the “injury in fact” required to state a claim under Section 17200, a plaintiff
 6 must have: 1) expended money due to the defendant’s acts of unfair competition, 2) lost money
 7 or property due to defendant’s acts, or 3) been denied as a result of defendant’s acts money to
 8 which he or she has a cognizable claim. *See Hall v. Time, Inc.*, 158 Cal. App. 4th at 854-55.

9 The Complaint alleges neither the necessary “injury in fact” nor any such injury was
 10 caused by Stryker’s alleged “wrongful conduct.” In this regard, plaintiff alleges only that she
 11 “underwent hip replacement surgery in January 2006,” that “[o]ne or more Stryker products were
 12 implanted or otherwise used in her surgery,” and that she “has paid approximately \$3,600 or
 13 more in out-of pocket expenses for the surgery.” Complaint ¶ 30. There is no allegation
 14 whatsoever that all or any part of the \$3,600 or more plaintiff paid in out-of-pocket expenses for
 15 the surgery (1) was paid, directly or indirectly, for the Stryker products implanted or used during
 16 the surgery, as opposed to some other aspect of the surgery (surgeon’s fees, anesthesiologist’s
 17 fees, operating room fees, antibiotics and other medicines used during the surgery, post-operative
 18 rehabilitation, medications, nursing fees, etc.); (2) benefited Stryker at all – directly or indirectly;
 19 or (3) reflected or resulted from any wrongdoing by *anyone*, much less by Stryker.

20 Simply put, plaintiff has alleged no facts reflecting that she suffered any injury *at all*,
 21 much less as a result of Stryker’s alleged misconduct.

22 **B. The Complaint Fails to Allege Facts Warranting an Award of Restitution**

23 To obtain restitution under Section 17200, a plaintiff must be an “[a]ctual direct victim[]”
 24 of unfair competition.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th at 1152. In
 25 addition, “[t]he offending party [Stryker] must have obtained something to which it was not
 26 entitled and the victim [plaintiff] must have given up something which he or she was entitled to
 27 keep.” *Day v. AT & T Corp.*, 63 Cal. App. 4th 325, 340 (1998) (emphasis original); *Feitelberg v.*
 28 *Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1012-13 (2005).

1 Though the Complaint seeks an award of restitution (Complaint, Prayer for Relief ¶ 3), it
 2 alleges no facts reflecting *any* of these essential elements of a claim for restitution under Section
 3 17200. As demonstrated in Point I.A., *supra*, the Complaint alleges neither that Plaintiff
 4 suffered any injury (much less a “direct” one) nor that Stryker “obtained” all or any part of, or
 5 otherwise benefited from, the \$3,600 or more in out-of-pocket expenses that plaintiff allegedly
 6 paid for her hip replacement surgery. By the same token, the Complaint alleges no facts from
 7 which it could be reasonably inferred that plaintiff was “entitled to keep” all or any part of the
 8 out-of-pocket expenses she allegedly paid.

9 **C. The Complaint Reflects that the Requested Injunctive Relief is Barred As a
 10 Matter of Law and, in Addition, that Abstention is Warranted by the
 11 Extensive Regulation, Redress, and Monitoring of the Alleged Kickback
 12 Schemes Already Implemented by Federal Authorities**

13 Though plaintiff seeks injunctive relief (Complaint, Prayer for Relief ¶ 4), such relief is
 14 barred as a matter of law for several reasons. First, the injunction sought is directed solely to the
 15 alleged “combinations, conspiracy, agreement, understanding, or concert of action as alleged
 16 herein.” *Id.* We have shown, however, that the Complaint fails to allege any actionable
 17 conspiracy or concerted misconduct. *See* Point I, *supra*.

18 Second, because plaintiff alleges no injury caused by Stryker’s alleged Section 17200
 19 violation, she lacks standing to ask this Court to enjoin that alleged misconduct. *E.g., Hall*, 158
 20 Cal. App. 4th at 849.

21 Finally, in view of the extensive regulation and monitoring of Stryker and others already
 22 implemented by federal authorities to redress the alleged “kickback schemes” underlying all
 23 of plaintiff’s allegations,² the requested injunctive relief would be pointless and likely

24 ² *See* Non Prosecution Agreement (“NPA”) between Stryker and the United States Attorney’s Office
 25 for the District of New Jersey (the “Office”) annexed to the Complaint as Exhibit A, and September
 26 27, 2007 press release referenced in Complaint ¶¶ 19 & 20 (the “Press Release,” a copy of which is
 27 attached as Exhibit A to the accompanying Declaration of William M. Goodman, Esq.), which
 28 describes that NPA and Deferred Prosecution Agreements (“DPAs”) between the Office and each of
 Zimmer, Inc., Depuy Orthopaedics, Inc., Biomet Inc., and Smith & Nephew, Inc.

1 counterproductive, and this Court should abstain from granting it.³

2 In 2007, through its NPA with Stryker and DPAs with Stryker's competitors, the
 3 Department of Justice imposed a rigorous program of restrictions, disclosure, and
 4 comprehensive, ongoing federal monitoring to redress the very alleged "kickback schemes" with
 5 consultants that are at the heart of plaintiff's Section 17200 claim in this action. As described in
 6 the Press Release:

7 Among the key requirements common to the DPAs and NPA:

8 • A federal monitor will be in place at each company to review
 9 compliance with the DPAs and NPA and all new and existing
 consulting relationships with the companies;

10 • Each company is required to conduct a needs assessment to
 11 determine the reasonable needs for educational consulting services,
 and new product-development consultants.

12 • All new consulting agreements shall require physicians to
 13 disclose their financial engagements with any company to their
 patients and require the companies to disclose the name of each
 consultant and what they have been paid on the company website.

15 See Declaration of William M. Goodman, Exhibit A, p. 4. The federal monitors appointed to
 16 insure compliance with these requirements and restrictions include, among others, former United
 17 States Attorney General John Ashcroft, former U.S. Attorney for the Central District of
 18 California Debra Yang, and former U.S. Attorney for the Southern District of New York David
 19 N. Kelley. *See id* pp. 2-3.

20 "It is well-established that a court of equity will abstain from employing the remedies
 21 available under the unfair competition law in appropriate cases." *Shamsian v. Department of*
22 Conservation, 136 Cal. App. 4th 621, 641 (2006). Judicial abstention is appropriate in cases (1)

23

24 ³ As the Press Release is referenced in the Complaint (see Complaint ¶¶17, 19, 20, 24), the
 25 Court may properly consider it in deciding this motion. *See, e.g., Tellabs, Inc. v. Makor Issues &*

26 *Rights, Ltd.*, 127 S.Ct. 2499, 2509 (2007) (on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court may consider "documents incorporated into the complaint by reference, and matters of

27 which a court may take judicial notice.") (citing 5B Wright & Miller § 1357 (3d ed. 2004 and Supp. 2007)). Stryker respectfully requests that the Court do so.

1 when federal enforcement of the subject law would be ““more orderly, more effectual, [and] less
 2 burdensome to the affected interests”” (e.g., *People ex rel. Dept. of Transportation v. Naegele*
 3 *Outdoor Advertising Co.*, 38 Cal. 3d 509, 523 (1985)); and (2) where granting injunctive relief
 4 would be unnecessarily burdensome for the trial court to monitor and enforce given the availability
 5 of more effective means of redress (e.g., *Diaz v. Kay-Dix Ranch*, 9 Cal. App. 3d 588, 599 (1970)).
 6 See generally *Alvarado v. Selma Convalescent Hosp.*, 153 Cal. App. 4th 1292, 1297-98 (2007);
 7 *Desert Healthcare Dist. v. PacifiCare FHP, Inc.*, 94 Cal. App. 4th 781, 795 (2001).

8 Stripped of the its baseless, conclusory assertions of “conspiracy,” the wrongdoing the
 9 Complaint alleges and seeks to enjoin is precisely that already targeted and fully redressed and
 10 supervised by the Department of Justice in a manner “more orderly and effectual” than injunctive
 11 relief that might be ordered by this Court. *People ex rel. Dept. of Transportation*, 38 Cal. 3d at
 12 523. Such relief would, in any event, be “unnecessarily burdensome for [this] Court to monitor
 13 and enforce given the availability of [the] more effective means of redress” already implemented
 14 by the federal government. *Diaz*, 9 Cal. App. 3d at 599. Further, the injunctive relief plaintiff
 15 seeks might well conflict and interfere with the DOJ’s ongoing regulatory program, which has
 16 been in place for almost a year. See *Shamsian*, 136 Cal. App. 4th at 642.
 17 In short, plaintiff has failed to state a claim for injunctive relief under Section 17200 or to
 18 establish her standing to do so. And even if she could state a claim, abstention would be
 19 warranted because, given the extensive efforts already undertaken by the United States
 20 Department of Justice, the requested injunction would be pointless, unnecessarily burdensome
 21 for the Court to monitor and enforce, and likely counterproductive.

22 **III. THE CLASS CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFF DOES
 23 NOT PLEAD THAT SHE IS A MEMBER OF THE PURPORTED CLASS**

24 As set forth above, plaintiff brings this action against Stryker on behalf of the following
 25 purported class:

26 All individuals who are, or at the relevant time were, residents of
 27 California who either were uninsured or had a private health care
 28 insurance policy pursuant to which they paid a percentage of the total
 costs of surgical procedures, and who had hip or knee implant surgery
 during the Class period that involved the use of Stryker products.

1 Complaint ¶ 31 (emphasis added).

2 Plaintiff, does not allege however, that she is a member of the purported class: while she
 3 claims to have paid approximately \$3,600 in “out-of-pocket expenses” for her surgery, she
 4 claims neither that she was “uninsured” nor that she “had a private health care insurance policy
 5 pursuant to which [she] paid [the \$3,600 as] a percentage of the total costs of surgical
 6 procedures.” *Id.* Plaintiff would not, therefore, be a proper representative of the class she seeks
 7 to represent. *See generally* Fed. R. Civ. P. 23(a); *see also J.P. Morgan & Co., Inc. v. Superior*
 8 *Court*, 113 Cal. App. 4th 195, 212 (2003) (“[A] class representative must be part of the class and
 9 possess the same interest *and suffer the same injury as the class members.*”) (emphasis added
 10 and internal quotations omitted).

11 Accordingly, the Court should limit the Complaint solely to Plaintiffs’ personal
 12 allegations, all of which should be dismissed for the reasons we have shown.

13

14 **CONCLUSION**

15 For all the foregoing reasons, we respectfully request that the Court dismiss the
 16 Complaint in its entirety.

17 DATED: May 16, 2008

18 **KASOWITZ BENSON TORRES & FRIEDMAN LLP**

19

20 By: /s/ William M. Goodman
 21 WILLIAM M. GOODMAN

22 **STERN & KILCULLEN, LLC**
 23 Joel M. Silverstein (Pro Hac Vice)
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24
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